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No. 155

In the

Supreme Court of the United States

October Term, 1962

CLARENCE EARL GIDEON,

Petitioner,

v.

H. G. COCHRAN, JR., DIRECTOR
DIVISION OF CORRECTIONS,

Respondent.

AMICUS CURIAE BRIEF FOR THE STATE OF ALABAMA PRESENTED BY ITS ATTORNEY GENERAL, MacDONALD GALLION

MacDonald Gallion
Attorney General
State of Alabama

George D. Mentz
Assistant Attroney General
State of Alabama

State Capitol
Montgomery 4, Alabama

Attorneys for Amicus Curiae

Read and Adopted by:
T. W. Bruton
Attorney General
and
Ralph Moody
Assistant Attorney General
State of North Carolina

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INTEREST OF THE AMICUS CURIAE

In granting the motion to proceed *in forma pauperis* and the petition for writ of certiorari, this Court requested counsel to discuss the following in their briefs and oral argument:

> "Should this Court's holding in *Betts v. Brady*, 316 U.S. 455, be reconsidered?"

Because of the importance of the question, Honorable Richard W. Ervin, Attorney General, State of Florida, invited the attorneys general of other states to submit amicus curiae briefs on this point.

ARGUMENT

I

In *Betts v. Brady* (1942), 316 U.S. 455, it was decided that the due process clause of the Fourteenth Amendment of the Constitution of the United States was not violated by the State of Maryland's refusal to accede to the accused's request and appoint counsel in that state's prosecution for a non-capital offense. The Court recognized that the question whether or not counsel should be appointed for indigents in state trials involving non-capital crimes is a matter which addresses itself to the considered judgment of the people, the legislatures and the courts of the individual and sovereign states of our Union. It was a reaffirmation of the principle, adopted in earlier decisions of this Court, that the first ten amendments to the federal constitution were not intended to limit the powers of the state governments in respect to their own people and affairs, but were designed to operate on the national government alone. *United States v. Dawson* (1853), 15 How. 467, 487; *Twitchell v. Pennsylvania* (1868), 7 Wall. 321, 325; *Ex parte Spies* (1887), 123 U.S. 131, 166; *Ex parte Sawyer* (1887), 124 U.S. 200, 219; *Brooks v. Missouri* (1887), 124 U.S. 394, 397; *Eilenbecker v. District Court* (1889), 134 U.S. 31, 34, 35; *West v. Louisiana* (1903), 194 U.S. 258, 262; *Howard v. Kentucky* (1905), 200 U. S. 164, 172.

It is true that times and conditions have changed since the cited cases were decided. However, to argue that such changes have outmoded the rationale of those decisions may well be compared with an assertion that time has rendered obsolete the principles of the Magna Charta. The validity and cogency of their reasoning and logic remain constant.

To overrule *Betts v. Brady* and hold that the due process

clause of the Fourteenth Amendment, makes the Sixth Amendment applicable to the individual states would be an unwarranted assault upon the Tenth Amendment which provides that the powers not delegated to the United States by the national constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people. Safeguards guaranteed by one amendment to the constitution are no more sacred than those protected by another. This Court should not favor the Fourteenth at the expense of the Tenth.

On numerous occasions this Court has ruled that the due process clause of the Fourteenth Amendment does not protect in state trials, by virtue of its mere existence, the accused's freedom from giving testimony by compulsion that is secured to him against federal interference by the Fifth Amendment of the federal constitution. *Twining v. New Jersey*, 211 U.S. 78; *Palko v. Connecticut*, 302 U.S. 319; *Knapp v. Schweitzer*, 357 U.S. 371. If, insofar as the states are concerned, the due process clause of the Fourteenth Amendment does not prevail over the Fifth Amendment, then there is no valid or logical reason why it should subjugate either the Sixth or Tenth Amendments.

The purpose of our nation's founding fathers was expressed clearly by this Court in *Barron v. Baltimore*, 7 Pet. 243, where Mr. Chief Justice Marshall declared:

> ". . . The [United States] Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. Each State established a Constitution for itself, and in that Constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situa-

> tion and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself. . .
>
> "These [the Fifth and Sixth] amendments contain no expression indicating an intention to apply them to state governments. This Court cannot so apply them."

This, we think, is a substantial reason for upholding the rule of *Betts v. Brady*, which stands for the principle that the Fourteenth Amendment does not make the Sixth Amendment applicable to the states. It is the essence of our federalism that states should have the widest latitude in the administration of their own systems of criminal justice. *Cicenia v. Lagay*, 357 U.S. 504, 510; *Hoag v. New Jersey*, 356 U.S. 464, 468.

II

Two members of the present Court, Mr. Justice Black and Mr. Justice Douglas, dissented when *Betts v. Brady* was decided in 1942, expressing their opinion that the Fourteenth Amendment made the Sixth applicable to the states. Their recent views, expressed in separate concurring opinions in *Carnley v. Cochran*, No. 158, October Term, 1961, decided April 30, 1962, U.S. , 82 S.Ct. , 8 L.Ed.2d 70, wherein this Court held that because of the factual situation there involved, Florida's denial of counsel to an indigent tried for a non-capital offense violated the Fourteenth Amendment, warrant close inspection.

In *Carnley v. Cochran*, Mr. Justice Black observed that twenty years' experience with the rule of *Betts v. Brady*, namely, that an indigent defendant charged with crime in a state court does not have a federal constitutional right to be provided with counsel unless this Court can say by an appraisal of the totality of the facts in a given case that the

refusal to provide counsel for the particular defendant constitutes "a denial of fundamental fairness shocking to the universal sense of justice," has demonstrated its basic failure as a constitutional guide. As he views it, the rule has served not to guide but rather to confuse the courts as to when a person prosecuted by a state for crime is entitled to a lawyer, and has imposed upon courts a perplexing responsibility. He points out that as the years have gone on, this Court, under the *Betts v. Brady* rule has been compelled to reverse more and more state convictions, thus demonstrating, to him, a growing recognition that our Bill of Rights is correct in assuming that no layman should be compelled to defend himself in a criminal prosecution. He complains that all defendants who have been convicted of crime without the benefit of counsel cannot possibly bring their cases to this Court. And he concludes by stating that he would overrule *Betts v. Brady*, would return to the holding in *Powell v. Alabama*, 287 U.S. 45, and would hold that, under the Fourteenth Amendment, all defendants prosecuted for crime are entitled to counsel whether it is their life, their liberty, or their property which is at stake in a criminal prosecution.

Admittedly, on that distant day when finally the millenium is reached, no layman shall be compelled to defend himself without legal assistance in a state criminal prosecution. No indigent individual shall be compeled to suffer illness or injury without the attention of a physician or benefit of necessary medicine or hospital care. No poor person shall be compelled to suffer the pangs of hunger or the discomforts occasioned by a lack of adequate clothing, suitable housing or other creature comforts. Humanitarian principles require that such assistance be given to the needy even today, but it cannot be argued logically that, under the due process or equal protection clauses of the Fourteenth Amendment, the states must furnish them. If and when, in the considered

judgment of the people of the individual states, such gratuitous services or aid are warranted morally or are feasible financially, they will be provided. Though man's social evolution is slow, history proves that he does advance in all fields. To be lasting, however, his progress must result from his own volition rather than come from judicial fiat.

The rule of *Betts v. Brady*, that counsel must be appointed when a failure to do so would be "shocking to the universal sense of justice," is no more vague, fickle, or confusing as a standard than is the nationally accepted requirement that before a person can be convicted of crime, the state must convince the court or jury of his guilt "beyond a reasonable doubt and to a moral certainty." Undoubtedly, many juries have been perplexed and confused by these vague terms and have caused miscarriages of justice; but seldom, if ever, has this point been argued as a ground for abolishing the jury system which Mr. Justice Douglas, in *Carnley v. Cochran*, describes as the "pride of the English-speaking world."

Undoubtedly, this Court has observed some cases where the failures of state trial judges to appoint counsel have shocked its sense of justice. Disregarded, however, is the fact that of the multitude of criminal trials which have been conducted in state courts throughout the nation, absent the assistance of defense counsel, only a relatively few have been attacked successfully on the ground that they were "shocking to the universal sense of justice." No claim is made that our state judges are perfect. They, even as do members of the federal judiciary, labor under the limitations and shortcomings imposed on mortal men. We do insist, however, that, by and large, state judges are intellectually and morally capable of fulfilling the duties of their offices and are sincere and conscientious in their efforts to see that all litigants who come before them are afforded justice

under the law. This is true with respect to the appointment of counsel for indigents charged with crime. Some errors are made; but, frequently, even those cases which this Court has seen fit to reverse because counsel were not appointed, afford grounds for honest differences of opinion.

Title 28, Section 1915, United States Code, and this Court's own Rule 53 refute Mr. Justice Black's charge that, "all defendants who have been convicted of crime without benefit of counsel cannot possibly bring their cases to us." In recent years there has been a growing trend among the states to expand the rights of indigent prisoners who seek relief from their convictions in the state appellate courts; and, particularly in the past few years, few, if any, state prisoners have been unaware of their right to proceed in the federal courts *in forma pauperis*. Casual inspection of the several state and federal reporter systems reflect the voluminous number of habeas corpus, coram nobis, and other proceedings which have been instituted by state prisoners throughout this country. The means for even indigent state prisoners bringing their cases to this Court exist, and the records of this Court will show that there is no hesitancy, reluctance, inability, or lack of ingenuity on the part of state prisoners to employ them.

Mr. Justice Black expresses a desire to return to *Powell v. Alabama*, 287 U.S. 45, which, as he points out, was a capital case. This Court in *Powell v. Alabama* said, ". . . (U)nder the circumstances, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process," but it added: "(W)hether this would be so in other criminal prosecutions or under other circumstances we need not determine. All that is necessary now to decide, as we do decide, is that, in a capital case, where the de-

fendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeblemindedness, illiteracy or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law."

This, as we view it, is a tacit recognition of the wisdom of the present rule that the necessity for the appointment of counsel must be determined "by an appraisal of the totality of facts in a given case."

In concluding, Mr. Justice Black remarked that he would hold that defendants prosecuted for crime are entitled to counsel whether it is their life, their liberty, or their property which is at stake in a criminal prosecution. This poses the problem whether an indigent is entitled to counsel only when he is prosecuted for a felony, or should the right be extended to cover cases where misdemeanors are involved. An illegal sentence of imprisonment for three or six months is no less a deprivation of liberty without due process of law than is one for a substantial number of years.

Then, too, since the due process clause of the Fourteenth Amendment protects property as well as life and liberty, it seems illogical to confine the mandatory appointment of counsel for indigents to criminal prosecutions. Not infrequently, a man's property is nearly as dear to him as is his liberty. As observed by Mr. Justice Roberts in *Betts v. Brady*, if the Fourteenth Amendment requires that counsel be furnished in all criminal trials, logic would require the furnishing of counsel in civil cases involving property. Surely, this was not intended by those who fashioned the Fourteenth Amendment.

In his concurring opinion in *Cocalog v. Cochran*, No. 158, October Term, 1961, decided April 30, 1962 (U.S. , 82 S.Ct. , 8 L.Ed.2d 70), Mr. Justice Douglas correctly assumed that the intricate procedural rules, complex and confusing to laymen, prescribed by the criminal statutes of Florida and the other states, are not applied with the same vigor against a layman defending himself as they are against one represented by a lawyer:

Where an accused is tried without the assistance of counsel, it is a widespread practice in Alabama, and presumably in the other states as well, for those who prosecute for the State to allow the accused great latitude in the presentation of his case. Few objections are interposed with respect to the admission of documentary evidence or during the direct and cross-examination of witnesses by the accused, with the result that much incompetent, irrelevant and hearsay evidence gets to the jury. Furthermore, where, as is generally the case, the accused makes no arguments to the jury, the prosecuting attorney also refrains from making any jury arguments. Those who are familiar with criminal prosecutions know that a closing argument to the jury, reviewing the really significant evidence and emphasizing its importance, is one of the most critical stages of a trial. It is there that an astute and skilled prosecutor exerts his greatest influence on the jury.

Admittedly, this leniency is usually grounded on the ulterior realization that any other course of conduct would generate in the mind of the jury an antagonism toward the prosecutor and would intensify the already present sympathy for the accused who, being unaided by counsel, appears in the role of the underdog. Whatever the reason, it

deprives the state's attorney of a potent weapon and works to the advantage of the accused. At the last meeting of the Alabama Bar Association, when this subject was discussed with a group of the State's prosecuting attorneys, there was widespread agreement among them that an accused, tried without aid of counsel, stands a better chance of obtaining from a jury either an outright acquittal or less severe punishment than one represented by an attorney. Many observers of the criminal trial scene are of the opinion that today only a few lawyers who undertake criminal defense cases are equal matches for career prosecutors whose intimate familiarity with a wide variety of criminal charges and prosecution techniques make them very formidable adversaries.

This demonstrates that, generally speaking, indigent persons charged with crimes are not as unfortunately situated as critics of the *Betts v. Brady* rule would have us believe. It also dilutes to a great extent Mr. Justice Douglas' statement in *Gayley v. Cochran* that the rule of *Betts v. Brady*, projected in a jury trial, faces a layman with a labyrinth he can never understand nor negotiate. Many of today's defendants are recidivists who are not strangers to legal proceedings; but even he who appears in court for the first time and is unattended by counsel, though not understanding it, usually can negotiate the "labyrinth" of a criminal prosecution. The record in the instant case reflects the fact that the petitioner presented the available defense about as ably as an average lawyer could have done.

In *Gayley v. Cochran*, Mr. Justice Douglas adopted the views which he, with the concurrence of Mr. Justice Brennan, expressed in *McNeal v. Culver*, 365 U.S. 109. There he stated:

"The result of our decisions is to refuse a state the

> power to force a person into criminal trial without a lawyer if he wants one and can afford to hire one, but to deny the same protection to an accused who is too poor to retain counsel. This draws a line between rich and poor that is repugnant to due process. . ."

He pointed out that *Betts v. Brady* requires the indigent, when convicted in a trial where he has no counsel, to show that there was fundamental unfairness, and he raised the question, "Are we to wait to overrule it [i.e., *Betts v. Brady*] until a case arises where the indigent is unable to make a convincing demonstration that the absence of counsel prejudiced him?"

The people of our United States have long favored a free enterprise system under which they take care of themselves. They have sought to avoid socialism which, as we understand it, is a state of affairs in which the government takes care of the people. A graphic illustration of this occurred on July 17, 1962, when, for the second time in two years, the United States Senate, a deliberative body which is responsive to the will of the people, defeated a medical aid bill which was designed primarily for the benefit of some 17,000,000 citizens over 65 years of age who reportedly are in dire need of medical treatment and cannot get it because they cannot afford it. The same bill bogged down in the Ways and Means Committee and never reached the floor of the House of Representatives for a vote.

Because of the inherent disparity in ability among people, our free enterprise system has always produced two classes of people—those who have and those who have not. No one questions the desirability of having furnished to those who are economically underprivileged many of the things which are available only to our more prosperous citizens. Yet it cannot be argued logically that a state's failure to provide

such things is a violation of the due process clause of the Fourteenth Amendment. Why, then, single out a state's failure to furnish counsel for a poor person charged with a non-capital crime and hold that it is repugnant to due process?

Frankly, we are puzzled by the question posed by Mr. Justice Douglas in *McNeal v. Culver*. It is our opinion that the whole concept of the "fundamental unfairness" which offends the Fourteenth Amendment is based upon the ability of an individual to make a convincing demonstration that he was prejudiced by some action or inaction on the part of a state which resulted in his conviction. In the absence of injury, the violation of some naked right should present no cause for complaint. As we view it, *Betts v. Brady* imposes no greater or lesser burden upon an accused, for whom counsel was not appointed in a state prosecution for a non-capital offense, than to prove that he was injured prejudicially thereby.

IV

Footnote 24 on page 27 of petitioner's brief asserts that from seventy-five to ninety percent of all state cases are decided by pleas of guilty. Surely, it is illogical, unwarranted and unrealistic to assume that, at most, anything more than a minute number of such guilty pleas are the product of anything other than a recognition by the accused that he is guilty, coupled with a knowledge that the state has uncontrovertible proof of his guilt, and an attendant awareness that his only hope for receiving the lightest punishment possible for his crime lies in cooperating with the state to the extent of dispensing with an unnecessary trial. For such accused persons as do enter guilty pleas under these circumstances, can it be argued with reason that, if the accused

is indigent, the state must be burdened with the necessity of appointing and paying an attorney solely for the purpose of pleading his client guilty?

Many of the less affluent counties of a state may find that in non-capital prosecutions it is an unbearably onerous financial burden to pay the fees of attorneys, especially where in good conscience the lawyers can only recommend that their clients enter guilty pleas. Conceivably, this might act as a deterrent to effective law enforcement. Furthermore, it is not an uncommon situation in thinly populated rural counties for there to be more persons charged with crime than there are lawyers versed in criminal practice; and some judges may encounter real difficulty in appointing enough qualified lawyers to serve at their criminal terms of court.

Clearly, the desirability or necessity for the appointment of counsel to represent indigents being prosecuted for non-capital crimes under these and other circumstances calls for a determination, not by a court far removed from the local scene, but by state authorities who have an intimate familiarity with and an understanding of the conditions, problems and attitudes of their own people.

CONCLUSION

Even with its exposure to occasional abuses, the rule of *Betts v. Brady* remains the best one for our American way of life. Any decision to make mandatory the appointment of counsel for all indigents charged with crime in state courts should come not from this Court but from the people of the individual states acting through their elected legislatures or judges.

JOINDER ON BRIEF

The foregoing amicus curiae brief has been read, and the arguments advanced therein have been approved and adopted as their own, by Honorable T. W. Bruton, Attorney General and Honorable Ralph Moody, Assistant Attorney General, State of North Carolina.

Respectfully submitted,

MacDonald Gallion
Attorney General
State of Alabama

George D. Mentz
Assistant Attorney General
State of Alabama

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

This is to certify that I, George D. Mentz, one of the attorneys for the amicus curiae and a member of the Bar of the Supreme Court of the United States, served copies of the foregoing Amicus Curiae Brief for the State of Alabama Presented by its Attorney General, MacDonald Gallion, on Honorable Abe Fortas, 1229-19th Street, N. W., Washington, D. C., attorney for petitioner, and on Honorable Richard W. Ervin, Attorney General, State of Florida, Capitol, Tallahassee, Florida, attorney for respondent, by mailing them, in properly addressed envelopes with air-mail postage prepaid.

in a United States mail box in Montgomery, Alabama, on the ..... day of December, 1962.

George D. Mentz
Assistant Attorney General
State of Alabama

Capitol
Montgomery 4, Alabama